

Decision **PROPOSED DECISION OF ALJ MASON** (Mailed 2/21/14)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Connie K. Walczak, *et al.*,

Complainants,

vs.

California Water Service Company (U60W),

Defendant.

Case 13-08-017
(Filed August 14, 2013)

DECISION GRANTING MOTION TO DISMISS COMPLAINT

1. Summary

The Commission hereby grants California Water Service Company's (Cal Water) Motion to Dismiss the Complaint filed by Connie K. Walczak, *et al.*, on the following grounds: first, the Complaint is procedurally defective as it attempts to litigate issues that are the subject of Cal Water's General Rate Case (Application 12-07-007) that is currently before the Commission for decision; and second, the Complaint is legally improper as it asks the Commission to retroactively alter rates that have been authorized under prior Commission decisions for the past 10 years.

This proceeding is closed.

2. Background

2.1. The Complaint

On August 14, 2013, Connie K. Walczak, and other ratepayers (Complainants) in California Water Service Company's (Cal Water) Marysville District, filed a complaint requesting that the rates Cal Water proposed in its July 2012 General Rate Case Application (GRC)¹ be denied, and that the past rate increases that the Commission authorized for the past ten years be investigated and reduced.²

2.2. Cal Water's Answer and Motion to Dismiss the Complaint

On October 4, 2013, Cal Water filed an Answer to the Complaint. Along with its Answer, Cal Water filed a Motion to Dismiss the Complaint (Motion) on the following grounds: (1) the Complaint has no merit as it seeks relief that is inconsistent with the Commission's ratemaking principles; (2) the Complaint is procedurally defective in that it attempts to litigate rates for the Marysville District outside of Cal Water's GRC; (3) the Complaint is substantively improper as the issues raised are duplicative of what the Commission and parties will litigate in Cal Water's GRC; (4) the Complaint is legally improper as it attempts to relitigate 10 years of prior Commission decisions that authorized Cal Water's

¹ In the Matter of the Application of California Water Service Company (U 60 W), a California corporation, for an order: 1) authorizing it to increase rates for water service by \$92,765,000 or 19.4% in test year 2014, 2) authorizing it to increase rates on January 1, 2015 by \$17,240,000 or 3.0%, and on January 1, 2016 by \$16,950,000 or 2.9% in accordance with the Rate Case Plan, and 3) adopting other related rulings and relief necessary to implement the Commission's ratemaking policies.

² Complaint, at 2.

rate increases; and (5) allowing the Complaint to continue would be against the public interest.

3. Standards for Ruling on a Motion to Dismiss

3.1. The First Standard: Do the Undisputed Facts Require the Commission to Rule in the Moving Party's Favor as a Matter of Law?

In *Raw Bandwidth Communications, Inc. v. SBC California, Inc. and SBC Advanced Solutions, Inc. (Raw Bandwidth)*, the Commission stated that a Motion to Dismiss “requires the Commission to determine whether the party bringing the motion prevails based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice.”³ A motion for summary judgment is appropriate where the evidence presented indicates there are no triable issues as to any material fact, and that based on the undisputed facts, the moving party is entitled to judgment as a matter of law. (California Code of Civil Procedure, § 437(c); Weil & Brown, *Civil Procedure Before Trial*, 10:26-27). While there is no express Commission rule for summary judgment motions, the Commission looks to § 437(c) for the standards on which to decide a motion for summary judgment. (*Id.*)⁴ Section 437(c) provides:

The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show

³ (2003) Decision (D.) 03-05-023 (*Scoping Memo and Ruling of Assigned Commissioner on Motion to Dismiss and Preliminary Matters* at 3, citing to *Westcom Long Distance, Inc. v. Pacific Bell et al.*, Decision (D.) 94-04-082, 54 CPUC 2d 244, 249).

⁴ See *Westcom*, *supra*, 54 CPUC 2d, 249-250.

that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

A further beneficial purpose of such a motion is “that it promotes and protects the administration of justice and expedites litigation by the elimination of needless trials.” (*Westcom Long Distance, supra*, 54 CPUC2d, 249). As such, where appropriate, the Commission regularly grants motions for summary judgment or summary adjudication. (See Decision (D.) 07-07-040 [granting Chevron judgment against Equilon “as a matter of law”]; Decision (D.) 07-01-004 [granting Cox Telecom judgment against Global NAPs of California]; and Decision (D.) 02-04-051 [granting summary adjudication of a claim by County Sanitation District against Southern California Edison]).

3.2. The Second Standard: Is Defendant Entitled to Prevail Even if the Complaint’s Well-Pleaded Allegations are Accepted as True?

In *Re Western Gas Resources-California, Inc.*, (1999) Decision (D.) 99-11-023, we articulated another standard for dismissing complaints and applications that is slightly different than what was adopted in *Raw Bandwidth*:

On a motion to dismiss a complaint, the legal standard against which the sufficiency of the complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law. (e.g., *MCI Telecommunications Corp. v. Pacific Bell*, Decision (D.)95-05-020, 59 Cal. PUC 2d 665, 1995 Cal. PUC LEXIS 458, at *29-*30, citing *Burke v. Yellow Cab Co.* (1973) 76 Cal. PUC 166), 3 CPUC 3d, 301.)

This standard was employed more recently in *Everyday Energy Corporation v. San Diego Gas & Electric Company*, (2012) Decision (D.) 12-03-037, wherein the Commission added: “By assuming that the facts as alleged in the complaint are true for the purpose of deciding whether to grant a motion to dismiss, we assume that complainant will be able to prove everything alleged in its complaint.” (Slip Op., 7.)

In determining if the complainant’s allegations are “well pleaded,” we are guided by the standards set forth in Pub. Util. Code § 1702, which provides that the complainant must allege that a regulated utility has engaged in an act or failed to perform an act in violation of any law or Commission order or rule:

Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or anybody politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.

As demonstrated by past precedent, the Commission will dismiss a complaint that fails to meet this two-pronged standard. (See *Monkarsh v. Southern California Gas Company*, (2009) Decision (D.) 09-11-017; *Pacific Continental Textiles, Inc. v. Southern California Edison Company*, (2006) Decision (D.) 06-06-011; *Watkins v. MCI_Metro Access Transmission Services*, (2005) Decision (D.) 05-03-007; *Rodriquez v. Pacific Gas and Electric Company*, (2004) Decision (D.) 04-03-010; *AC Farms Sheerwood v. So. Cal Edison*, (2002) Decision (D.) 02-11-003; and *Crain v. Southern California Gas Company*, (2000) Decision (D.) 00-07-045.)

4. The Undisputed Facts Establish that Complainants are attempting to litigate matters that are part of Cal Water's GRC and that, as such, their Complaint Is Procedurally Defective.

It is undisputed that the Complainants wish to utilize the Commission's formal complaint procedure to challenge not only Cal Water's current GRC, but GRC's going back the last 10 years in order to obtain relief for the water charges imposed on the residents of Marysville.⁵ Complainants assert that Marysville is experiencing an economic crisis and that its residents, some of whom live under the poverty line, cannot afford another water-rate increase.⁶ It is also undisputed that Cal Water has a current GRC before the Commission, and Marysville is one of the 25 operating districts that will be affected if the Commission grants Cal Water the right to increase water rates.⁷ A public participation hearing was held in Marysville on April 8, 2013, and Maryville residents were given the opportunity to share their concerns and any opposition to Cal Water's proposed water-rate increase with representatives from Cal Water and the Commission's Office of Ratepayer Advocates.⁸ Despite these undisputed facts, Complainants would like to pursue their legal claims against Cal Water in a separate

⁵ Complaint, at 2.

⁶ *Id.*

⁷ In the Matter of the Application of California Water Service Company (U 60 W), a California corporation, for an order: 1) authorizing it to increase rates for water service by \$92,765,000 or 19.4% in test year 2014, 2) authorizing it to increase rates on January 1, 2015 by \$17,240,000 or 3.0%; and on January 1, 2016 by \$16,950,000 or 2.9% in accordance with the Rate Case Plan, and 3) adopting other related rulings and relief necessary to implement the Commission's ratemaking policies. Application 12-07-007.

⁸ See *Administrative Law Judge's Ruling Noticing Public Participation Hearings*, February 15, 2013, *passim*; and RT, *passim*.

proceeding in which the same legal and factual issues will be addressed as those in Cal Water's GRC.

The Complaint must be dismissed because allowing it to proceed would be contrary to the rules that this Commission has articulated for the filing and resolution of utility requests for rate increases. In Order Instituting Rulemaking on the Commission's Own Motion to Evaluate Existing Practices and Policies for Processing General Rate Cases and to Revise the General Rate Case Plan for Class A Water Companies, Rulemaking 03-09-005, the Commission issued an *Interim Order Adopting Rate Case Plan* that requires Class A water utilities such as Cal Water (*i.e.*, those with more than 10,000 service connections) to submit GRC's on a three-year cycle in accordance with Pub. Util. Code § 455.2.⁹ We have explained on previous occasions that:

GRCs are a traditional regulatory proceeding in which a utility files a revenue requirement request based on its estimated operating costs and capital needs for a particular test year. The Commission determines the reasonable amount of revenue requirement necessary to provide safe and reliable

⁹ Pub. Util. Code § 455.2(a) and (c) state: (a) The Commission shall issue its final decision on a general rate case application of a water company with greater than 10,000 service connections in a manner that ensures that the Commission's decision becomes effective on the first day of the first test year in the general rate increase application. ...

(c) The Commission shall establish a schedule to require every water corporation subject to the rate case plan for water corporations to file an application pursuant to the plan every three years. The plan shall include a provision to allow the filing requirements to be waived upon mutual agreement of the Commission and water corporation.

service, to cover costs, and to permit the utility an opportunity to make reasonable earnings.¹⁰

When the utilities and participants comply with our GRC protocols, the

Commission is able to promote:

- Utility viability in changing economic conditions;
- An appropriate balance of risks and rewards for utilities;
- Utility management accountability through regular performance review;
- Timely implementation of legislative and regulatory policies by utilities;
- Participation by intervenors such as customers, public interest groups, and state and local government bodies in our regulatory process;
- Predictability for investors, bond-holders, and others in the financial community; and
- More efficient use of participant resources by virtue of the scheduling and coordination provided by the GRC.¹¹

These goals would not be met if we were to permit both a GRC and a separate complaint that attacks the GRC to proceed simultaneously. All the issues that Complainants wish to raise in their Complaint should, instead, be raised as part of the GRC so that all issues can be resolved, comprehensively, in one decision.

¹⁰ Order Instituting Rulemaking to Develop a Risk-Based Decision-Making Framework to Evaluate Safety and Reliability Improvements and Revise the General Rate Case Plan for Energy Utilities, November 22, 2013, at 4.

¹¹ *Id.*, at 5.

5. The Undisputed Facts Establish that Complainants wish the Commission to engage in Retroactive Ratemaking and that, as such, their Complaint is Legally Improper.

In addition to asking that the rate sought in the current GRC be denied, Complainants also want the Commission to reduce the water-rate increases granted to Cal Water for the past 10 years.¹² Complainants are, effectively, asking the Commission to engage in retroactive ratemaking by altering the rate increases it granted to Cal Water going back to 2003.¹³

However, the law is clear that the Commission may not engage in retroactive ratemaking. Pub. Util. Code § 727.5 vests the Commission with the power to set water rates only on a prospective basis:

- (a) In establishing rates for water service, the commission shall consider, and may establish, separate charges for costs associated with customer service, facilities, variable operating costs, including fixed and variable costs associated with supplying the water, or other components of the water service provided to water users.
- (b) The commission shall consider, and may authorize, a water corporation to assess a fee for future water service, or a reservation charge for future water service, for persons or entities occupying or owning property within the service territory of the water corporation.

The California Supreme Court had its first opportunity to address the question of retroactive ratemaking--although in the context of a telephone company--in *Pacific Telephone & Telegraph Company v. Public Utilities Commission* (1965)

¹² Complaint, at 2-3.

¹³ Our prior decisions granting Cal Water rate increases from 2003 are Decision (D.) 03-09-021; Decision (D.) 04-06-021; Decision (D.) 04-09-038; Decision (D.) 05-07-022; Decision (D.) 06-08-011; Decision (D.) 07-12-055; and Decision (D.) 10-12-017.

62 Cal.2d 634, wherein the Court, after construing the language of Pub. Util. Code § 728 ,¹⁴ held as follows:

The Legislature has not undertaken to bestow on the commission the power to roll back general rates already approved by it under an order which has become final, or to order refunds of amounts collected by a public utility pursuant to such approved rates and prior to the effective date of a commission decision ordering a general rate reduction.¹⁵

By its holding, the Court reaffirmed “the rule that general rate making is legislative in character and looks to the future.”¹⁶ The Court’s holding that in setting general rates, the Commission may only act prospectively, has been reaffirmed in subsequent decisions. (See e.g. *City of Los Angeles v. Public Utilities Commission* (1972) 7 Cal.3d 331, 338; and *Southern California Edison Company v. Public Utilities Commission* (1978) 20 Cal.3d 813, 816-817.) The rationale

¹⁴ Pub. Util. Code § 728 states: Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force.

In determining and fixing rates for a telephone corporation pursuant to this section or pursuant to Section 455, or in determining whether or not a proposed rate increase is justified pursuant to Section 454, the commission shall, among other things, take into consideration any evidence offered concerning the quality of the particular telephone corporation’s services as compared with that of telephone corporations in adjacent territory, and the permissible rates for comparable service charged by telephone corporations in adjacent territory.

¹⁵ 62 Cal.2d, at 650.

¹⁶ *Id.*, at 655.

underlying the Court's decision would apply with equal force to water utility rate cases.

In addition, the principle against retroactive ratemaking is also found in Pub. Util. Code § 734 which provides, in part:

No order for the payment of reparation upon the ground of unreasonableness shall be made by the commission in any instance wherein the rate in question has, by formal finding, been declared by the commission to be reasonable.

As noted above, the rates Complainants seek to reduce were approved by the Commission during various GRCs. The instant proceeding should be contrasted with those in *W.W. Ward* (1925) 27 C.R.C. 269, 271, wherein the Commission ordered the water company to return monies collected to the ratepayers because the evidence established that "Ward arbitrarily and upon his own initiative, without the proper authority of this Commission, increased the rates charged for water service to certain of his consumers." This is not the situation we are confronted with in Cal Water's GRC. Accordingly, Complainants may not be allowed to use their Complaint as a means to undermine settled case and statutory law against retroactive ratemaking.

6. Even if the Commission Assumed that the Complaint's Allegations are True, the Complaint's Procedural and Legal Defects Require that it be Dismissed.

Employing the second standard for deciding if a Motion to Dismiss must be granted leads us to the same conclusion that this Complaint must be dismissed. The assumed truth of the factual allegations cannot alter the fact that Complainants cannot use a formal complaint to attack an ongoing GRC, and that the Commission may not engage in retroactive ratemaking. Thus, for all the reasons set forth above, the Complaint must be dismissed.

7. Categorization and Need for Hearing

The Instructions to Answer filed on September 4, 2013, categorized this complaint as adjudicatory and that a Prehearing Conference will be scheduled unless the matter is resolved by the parties. But because of the reasoning set forth in this proposed decision, this complaint must be dismissed so there is no need for a Prehearing Conference.

There was a preliminary determination that hearings were needed. However, because we have determined that the complaint must be dismissed as a matter of law, there is no need for evidentiary hearings.

8. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were filed.

9. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Robert M. Mason III is the assigned ALJ in this proceeding.

Findings of Fact

1. Connie K. Walczak and the other complainants are residents of Marysville, California.
2. Marysville, California, receives its water from Cal Water.
3. On July 12, 2012, Cal Water filed its GRC. One of the districts that will be affected by Cal Water's GRC is the Marysville District.
4. A public participation hearing was held in Marysville, California, on April 8, 2013, and Marysville residents were given the opportunity to voice their

concerns and any opposition to Cal Water's GRC. Representatives from Cal Water were also present at this public participation hearing.

5. On August 14, 2013, Connie K. Walczak, et al, filed the instant Complaint against Cal Water.

6. The Complaint asks that the Commission deny Cal Water's GRC.

7. The Complaint also asks that the Commission review and reverse the rate increases granted to Cal Water for the last 10 years.

8. On October 4, 2013, Cal Water filed an Answer to the Complaint.

9. Along with its Answer, Cal Water filed a Motion to Dismiss the Complaint.

Conclusions of Law

1. The Complaint is procedurally defective because it is attempting to litigate issues that are the subject of Cal Water's GRC.

2. Allowing the Complaint to proceed simultaneously with Cal Water's GRC would be inconsistent with Pub. Util. Code § 455.2 and the Interim Order Adopting Rate Case Plan in R.03-09-005.

3. The Complaint is legally improper because it requests that the Commission engage in retroactive ratemaking.

4. Retroactive ratemaking is prohibited by Pub. Util. Code §§ 727.5 and 728.

5. Retroactive ratemaking is prohibited by Pub. Util. Code § 734.

6. The Complaint must be dismissed for failure to state a cause of action.

7. Hearings are not necessary.

O R D E R

IT IS ORDERED that:

1. The Complaint filed by Connie K. Walczak, et al., is dismissed.
2. No hearings are necessary.
3. Case 13-08-017 is closed.

This order is effective today.

Dated _____, at San Francisco, California.